Supreme Court, U.S.
FILED
FEB 28 1997
CLERK

No. 96-1201

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1996

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE; WILLIAM GIBSON, Doctor; FREDERICK CALHOUN JAMES, Bishop; HERBERT WILLIAMS, Reverend; WILLIE B. OWENS; SOUTH CAROLINA CONFERENCE OF THE NAACP BRANCHES; MICHAEL G. BURTON, as Executive Director on behalf of the Republican Party; WILLIAM L. COLLINS, III; EARLY COPELAND; WILLIAM PATRICK FLACK; FRANK E. GIBSON, III; NANCY D. HAWK; and GUS ROBERTS,

Petitioners,

versus

DAVID M. BEASLEY, in his official capacity as Governor of South Carolina; DAVID H. WILKINS, in his official capacity as Speaker of the South Carolina house of Representatives, and THE SOUTH CAROLINA SENATE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether plaintiffs in a reapportionment case were prevailing parties for the purposes of an attorneys' fee award when their reapportionment plan was rejected by a three-judge district court and the state legislature subsequently adopted a plan of its own without further substantive action by the three-judge court?

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BRIEF IN OPPOSITION

Respondents Beasley and Wilkins respectfully submit this

Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit filed on January 28, 1997 by Petitioners Statewide Reapportionment Advisory Committee, et al.

COUNTERSTATEMENT OF THE CASE

This matter arises out of Petitioners' claim for almost $570,000 in attorneys' fees. Almost all of that amount was incurred in advancing reapportionment plans which the district court emphatically rejected.

The underlying litigation consisted of two separate reapportionment actions consolidated below and on appeal. The first of the two cases was filed on October 4, 1991, by Michael G. Burton, Executive Director of the South Carolina Republican Party, and others. The principal defendants were the presiding officers of the South Carolina Senate and House of Representatives and the Governor.[1]

The second case was filed several weeks later on October 31, 1991, by the self-styled Statewide Reapportionment Advisory Committee (SRAC), the South Carolina State Conference of the NAACP, and four individual black citizens.

Both cases sought a declaration of the obvious fact that the districts (House, Senate and Congressional) drawn according to the 1980 Census were no longer constitutional under the 1990 Census. Both cases also sought a declaration

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[1] This brief was prepared entirely by counsel for Appellee Wilkins. Counsel for Respondent David Beasley requested that this brief contain the following statement, representing the position of Governor Beasley in this appeal in his official capacity as Governor of South Carolina:

> The Office of the Governor takes a neutral position on the issues involved in this appeal and does not assert arguments for or against the relief sought in the appeal but leaves the matter to the discretion and judgment of the Court.

that the legislative process was deadlocked, and as a remedy asked that court-ordered plans be imposed in order for the 1992 elections to be held on schedule.

The South Carolina General Assembly had opportunities in both 1991 and early 1992 to enact reapportionment plans, but was unsuccessful in so doing. House and Senate plans passed both houses in January 1992, but were vetoed by the Governor, and the vetoes were not overridden. Each house passed a different Congressional plan, but neither obtained the approval of the other house.

In January 1992, the district court entered a scheduling order stating that the issue of legislative deadlock would be heard in February 1992, with a hearing on the parties' submitted plans to begin several days later. The trial before the three-judge panel began on February 19, 1992, and concluded on March 6, 1992. At the hearings, the parties presented their positions as to the appropriate size, location and shape of the reapportioned districts. Also in February 1992, all parties agreed that a legislative impasse existed.

On May 1, 1992, the court issued an order rejecting the plans proposed by the plaintiffs (and the defendants as well), and instead ordering the use of plans of the court's own fashioning in the 1992 elections and until the South Carolina General Assembly adopted lawful plans of its own. *Burton v. Sheheen*, 793 F. Supp. 1329 (D.S.C. 1992)(three-judge court). As the court later noted, "the plans presented by the parties suffered a myriad of infirmities" and the court's plans "did not remotely resemble the plans presented

by either plaintiff." Pet. App. 24-25.[2]

A separate question from the factual nature of the plans was the issue of whether the court's plans should be reviewed under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. While the court applied some aspects of Section 2 analysis to its plan, it held that the substantive standards of Section 2 need not be fully imported into this case. 793 F. Supp. at 1351.

Appeals to this Court were taken by SRAC and by Governor Campbell, whose proposed plan was similar to that put forth by the Republican Party. The Republican Party was not an appellant when the case was taken to this Court. Both appellants argued that the three-judge court erred in not approving their respective plans; they also argued that full Section 2 analysis should be applied, a point that was supported by the Justice Department in an amicus brief invited by this Court. During the pendency of the appeal of the court's plan, the 1992 elections were held using the plan which the court had drawn.

On June 14, 1993, this Court issued the following order regarding the SRAC and Campbell appeals:

> The judgment is vacated and the cases are remanded to the United States District Court for the District of South Carolina for further consideration in light of the position presented by the Solicitor General in his brief for the United

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[2] The court had noted in 1992 with respect to the plaintiffs' respective plans for the House that "the Republican Party and the Governor appear to seek to eliminate Democrats and the SRAC appears to seek to eliminate incumbents because of their race." 793 F. Supp. at 1364.

States filed May 7, 1993.

Campbell v. Theodore, 113 S.Ct. 2954 (1993). [3]

On remand, with no elections scheduled for the near future, the court permitted the General Assembly additional time to enact redistricting plans. By the end of May 1994, plans for the House and the Congressional districts had been enacted by the General Assembly and precleared by the Justice Department within the timeframe permitted by the court. Senate districts were reapportioned by legislation passed in 1995 and precleared on May 30, 1995, also within the timeframe permitted by the court.

The normal years for Senate elections were 1992 and 1996, but in the meantime, before the General Assembly's Senate plan had been enacted and precleared, a Senate seat came open. The Senate sought the permission of the three-judge court to use the court's 1992 district lines for this special election. Holding that this motion by the Senate was "a proposal reflecting the policy choices of the elected representatives of the people" under *McDaniel v. Sanchez*, 452 U.S. 130, 152 (1981), the court in August 1994 ordered that the court's plan for Senate District 1 be submitted for preclearance under Section 5. The Republican Party and SRAC had argued that preclearance should be required.

The Justice Department precleared the court's plan on December 12, 1994. See Pet. App. 2C. However, as the court later noted, the plaintiffs' victory was "pyrrhic at best," Pet. App. 26, because the result of obtaining preclearance

[3] The order in *SRAC v. Theodore*, also at 113 S.Ct. 2954, is identical.

was that the Justice Department approved part of the 1992 court plan for the Senate which plaintiffs had strenuously opposed.

Shortly after the entry of the original 1992 order containing the court's plan, the Republican Party moved for attorneys' fees under the statutes providing for such fees in civil rights and voting rights cases. SRAC filed a similar motion shortly thereafter.

The court did not consider attorneys' fees until the case ended, i.e. when the last of the legislatively-enacted plans was precleared in May 1995. On August 16, 1995, the three-judge court dismissed the cases. Additional briefs and supplemental affidavits were received on the issue of attorneys' fees. The total amount claimed by counsel is $569,153.

On December 15, 1995, the district court issued an order denying all motions for attorneys' fees by plaintiffs SRAC and the Republican Party. On plaintiffs' appeal to the Court of Appeals for the Fourth Circuit, that court, citing *Farrar v. Hobby*, 506 U.S. 103, 113 (1992) and *S-1 and S-2 v. State Board of Education of North Carolina*, 21 F.3d 49 (4th Cir. 1994)(en banc), *cert. denied*, 115 S.Ct. 205 (1994), held that none of the results in the district court constituted an enforceable judgment, consent decree or settlement or a "material alteration in the relationship between the parties." Pet. App. 7-8.

REASONS FOR DENYING THE WRIT

A. *The decision below correctly applied this Court's precedents.*

It is readily apparent that plaintiffs' primary legal

argument is with a case which this Court has declined to review. *S-1 and S-2 v. State Board of Education of North Carolina*, 21 F.3d 49 (4th Cir. 1994)(en banc), *cert. denied*, 115 S.Ct. 205 (1994).[4] That case is discussed in Question C herein. Plaintiffs spend much more time discussing *S-1* than they do in disputing the correctness of the judgment below. Regardless of whether the rule in *S-1* is followed in this case, however, the Court of Appeals reached the correct result. The benefits plaintiffs obtained from this litigation were meager or nonexistent, and the appropriate fee award, under prior decisions of this Court, was no fee at all.

Plaintiffs' "success" began and ended with the filing of the summons and complaint in the *Burton* case and the uncontested preliminary ruling shortly thereafter that the 1980 Census could not serve as the basis for legislative districts in the 1990's. The remainder of plaintiffs' effort, and nearly all their time and costs, were devoted to advocating the creation of districts which served the plaintiffs' respective (and complementary) partisan goals. However, the district court adopted a redistricting plan which, as that court later noted, "did not remotely resemble the plans proposed by either plaintiff." Pet. App. 25. The district court noted that plaintiffs' plans were not only rejected, but that the testimony offered by plaintiffs and heard by the court "was of little help in creating [the court's] plan." *Id.* Plaintiffs thus seek public reimbursement not for the successful vindication of constitutional rights, but for their rejected self-serving and partisan efforts.

Courts have declined to award fees for unsuccessful

[4] Remarkably, plaintiffs' citation of *S-1* does not mention the denial of certiorari in the case. *See, e.g.*, Pet. at vi, 7.

lobbying of a redistricting plan in the courts. The familiar standard for determining whether one is a "prevailing party" under 42 U.S.C. § 1973*l*e or 42 U.S.C. § 1988 is whether the plaintiff has "succeed[ed] on a significant issue in litigation which achieves some of the benefits the party sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 443 (1983). In reapportionment cases the application of this standard is not as straightforward as in many other types of civil rights cases. Unlike the typical action for damages, or even the typical action for an injunction, the result obtained is often far different from the result sought by a particular plaintiff. In *Hastert v. Illinois State board of Election Commissioners*, 28 F.3d 1430 (7th Cir. 1993), *cert. denied*, 115 S.Ct. 426 (1994), the Seventh Circuit noted:

> This is not ordinary litigation. . . . Each [plaintiff] had a plan to offer and the winner, at least from a lay person's perspective, is the litigant whose plan and objectives (usually incorporated in its map) the district court adopted. Conveniently, this common-sense understanding of winners and losers coincides in large part with the Supreme Court's definition of "prevailing party."

28 F.3d at 1439.[5] *See also*, *Daggett v. Kimmelman*, 811 F.2d 793, 801 (3d Cir. 1987)(state was "not obligated to compensate counsel's efforts merely to maximize anyone's political advantage").

The district court, noting that the reasoning of *S-1* was

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[5] *Hastert* concluded that the court's ultimate approval of one party's plan made that party the "clear winner." 28 F.3d at 1440.

disapproved by other circuits, reviewed the attorneys' fee petition independently of the reasoning of *S-1*. Pet. App. 19-27. It concluded as follows:

1. The uncontested decision that plans based on the 1980 Census could no longer be used was not a "significant issue." Pet. App. 20. *See Farrar, supra,* 506 U.S. at 110.

2. The declaration that the South Carolina General Assembly was at an impasse was a procedural and interlocutory victory which "eventually led to a rejection of the plans proposed by the plaintiffs." Pet. App. 23 (citing *Hewitt v. Helms*, 482 U.S. 755, 760 (1987)).

3. The creation of a minority opportunity Congressional district was not a victory for the plaintiffs, whose plans for such a district "did not remotely resemble the plans proposed by either plaintiff." Pet. App. 25. The court further noted that every plan presented at the trial, including the defendants' plan, contained such a district. Pet. App. 24.[6]

4. While the plaintiffs prevailed on their argument that the State Senate plan should be

[6] Apparently only SRAC argued in the district court that prevailing party status could be based on the creation of the minority opportunity Congressional district. The district court noted that SRAC's presence as to this issue was "superfluous," since the Republican Party had already filed suit. Pet. App. 24.

precleared by the Justice Department before a special Senate election could be held, this victory was "pyrrhic," because it led to the Justice Department's approval of the court's 1992 plan, a plan which plaintiffs had strenuously opposed. The practical result from this "victory" rendered it merely technical or *de minimis*, and therefore not compensable. Pet. App. 26, 30 (quoting *Farrar, supra*, 506 U.S. at 117 (O'Connor, J., concurring).

5. Finally, a judgment which plaintiffs obtained from this Court, vacating and remanding the district court's decision, did not lead to any actual relief for the plaintiffs and thus was likewise merely technical and *de minimis*. Pet. App. 27, 29. The vacatur order required the district court to consider the case "in light of the position of the Solicitor General" in a brief filed in the case, but this Court did not order that results of the elections already held be vacated. Pet. App. 27. Essentially the issue was whether the plan should be reviewed under Section 2 of the Voting Rights Act. However, since the South Carolina General Assembly eventually agreed on a reapportionment plan, it was unnecessary for the district court to conduct this reconsideration.[7]

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[7] A further anomaly of plaintiffs' position is that they now claim that the district court decision they appealed to this Court was a decision on which they prevailed, and indeed was an "exceptional" success. Pet. at 15. This is a rather noteworthy revision of their original estimate of the value of the district court's plan. If, as Petitioners state, the adoption of the court's plan achieved "essentially all of the basic goals of [Petitioners'] litigation," Pet. App. 17, one has to question why nearly all the fees sought were for work in advocating completely different plans.

Each of the above conclusions of the district court was reached specifically without reference to *S-1*. In addition, the results reached by both the district court and the Court of Appeals embodied a correct application of this Court's precedents. For instance, *Farrar v. Hobby, supra,* requires that in order to qualify as a prevailing party,

> [t]he plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, *Hewitt, supra,* 482 U.S. at 760, or comparable relief through a consent decree or settlement. *Maher v. Gagne,* 448 U.S. 122, 129 (1980). Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement.

In *Hewitt, supra,* 482 U.S. at 763, this Court left the "catalyst" issue open:

> We need not decide the circumstances, if any, under which this "catalyst" theory could justify a fee award under §1988, because even if Helms can demonstrate a clear causal link between his lawsuit and the State's amendment of its regulations, and can "prevail" by having the State take action that his complaint did not in terms request, he did not and could not get redress from promulgation of the informant-testimony regulations.

No subsequent decision of this Court has explicitly considered the issue of whether one who has received no enforceable remedy from the litigation may still be

compensated for playing the alleged role of a "catalyst" for a defendant's later change in conduct. It is not necessary to consider the "catalyst" issue, because plaintiffs clearly did not succeed under the principles set forth in *Farrar* and *Hewitt*.

The position of the plaintiffs in obtaining an uncontested judgment that the districts based on the 1980 Census could no longer be used is comparable to the nominal damages judgment received by the plaintiff in *Farrar*. Since the court did not adopt the plaintiffs' plans, or anything close to them, the result was similar to that described in *Hewitt*, where the plaintiff received only "the moral satisfaction [that] results from any favorable statement of law." *Hewitt*, *supra*, 482 U.S. at 762. The district court's formal declaration of the obvious, moreover, did not "modify[ ] the defendant's behavior in a way that directly benefits the plaintiff." *Farrar*, 506 U.S. at 111-112. The lack of direct benefit to the plaintiffs from the original judgment in this case is shown by the decision of SRAC and Governor Campbell to appeal it to this Court.

It is not reasonably arguable that any other results in this case constituted "relief . . . [which] directly benefit[ted] [plaintiffs] at the time of judgment or settlement." *Farrar*, 506 U.S. at 11. Plaintiffs cannot point to any benefit to them from this Court's vacatur judgment which never led to a further judgment on the merits, nor can they claim to have derived benefit from the decision requiring preclearence of the Senate plan when the result of the preclearence process was adverse to their position.

Plaintiffs claim that the result in this case is undesirable from a policy standpoint because it will make it more difficult

"for economically disadvantaged minorities[8] to redress their grievances in the courts." Pet. at 23. In fact, however, requiring that a party actually succeed in litigation before recouping attorneys' fees is the soundest possible way to insure that the time of the courts and the parties will not be wasted with the use of high-priced lawyers to make lengthy presentations of extravagantly partisan positions. Since clients in civil rights cases seldom pay their counsel in the event of a loss, and therefore do not necessarily seek to limit the costs, only the courts can control the cost of this litigation to the public treasury. Plaintiffs' effort to recover $570,000 in attorneys' fees for their futile efforts to lobby their political positions in litigation was properly rejected by both the three-judge district court and by the Court of Appeals.

B. *Any conflict among circuits should await resolution until a case arises in which the issue is dispositive.*

Any conflict between the rule of the Fourth Circuit's *S-1* case and the rule followed in other circuits should await its presentation in a case in which the resolution of the conflict would affect the outcome of the case. If this Court were to review this case, it is extremely doubtful that a different result would be reached even if this Court were to disapprove the Fourth Circuit's rule in the *S-1* case. For this reason alone, certiorari should be denied.

In addition, there is no likelihood that the plaintiffs' 1991 lawsuits were the "catalysts" for the General Assembly's 1994 and 1995 enactments establishing reapportionment plans different from the plans adopted by the

[8] This term presumably excludes the Republican Party.

three-judge court for the 1992 elections. Even in those circuits in which the catalyst theory has been applied, the courts have insisted that plaintiffs prove the causal connection between their lawsuit and the defendants' change in conduct. *See, e.g., Pearson v. Fair*, 980 F.2d 37, 44 (1st Cir. 1992); *Stivers v. Pierce*, 71 F.3d 732, 752 (9th Cir. 1995). Beyond a bald assertion of the claim, Pet. App. 16, plaintiffs devote no effort to trying to prove that this case later caused the South Carolina General Assembly to enact its own reapportionment plans several years after the vacated 1992 district court decision. This is another reason in and of itself why this case is poor vehicle for examination of the merits of applying catalyst theory. Plaintiffs spend nearly 15 pages discussing why catalyst theory should apply to this case, but only one sentence asserting that their suit actually was a catalyst for the General Assembly's subsequent actions. The absence of a catalyst effect in this case was noted in Judge Niemeyer's concurring opinion. Judge Niemeyer stated that even aside from the *S-1* rule, the "question of who prevailed, even when measuring the results obtained through the political process, is so unclear that [the district court could not be held to have abused its discretion in denying fees]." Pet. App. 9. Since plaintiffs cannot reasonably claim that their suit was the catalyst for the subsequent adoption of legislatively-enacted plans, and indeed hardly make the effort to do so, review of catalyst doctrine would be a useless exercise for this Court in this case.

C. *The Fourth Circuit's rule in S-1 is the preferable rule because it avoids the examination of confusing threads of causation.*

In the *S-1* case, the Fourth Circuit adopted a clear rule which is the logical extension of cases such as *Farrar* and *Hewitt*. *S-1* holds that fees should not be awarded unless a

plaintiff has obtained relief "by virtue of having obtained an enforceable judgment, consent decree or settlement giving some of the legal relief sought in a §1983 action." 21 F.3d at 51. This statement is nearly an exact quote from *Farrar*, 506 U.S. at 111.[9] In *S-1*, the settlement of the case with local officials caused the underlying judgment to become moot. As a result, the Fourth Circuit dismissed the case and vacated the district court's judgment. *S-1 v. Spangler*, 832 F.2d 294 (4th Cir. 1987). Three years after the dismissal and vacatur, the North Carolina legislature amended the statute involved in the case. The plaintiffs, who had derived full satisfaction from the local entity's action some years earlier, sought attorneys' fees based on the claim that their suit was the catalyst for the state's action.[10] The en banc decision of the Fourth Circuit concluded that absent the prerequisite judgment or other enforceable form of remedy, the above-quoted requirements of *Farrar* and *Hewitt* had not been met.

In the unlikely event that this case is viewed as a proper vehicle for review of the Fourth Circuit's *S-1* rule, the respondent Wilkins submits that that case represents the

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[9] "The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, *Hewitt, supra*, 482 U.S., at 760, or comparable relief through a consent decree or settlement, *Maher v. Gagne*, 448 U.S. 122 (1980)." *Farrar*, 506 U.S. at 111.

[10] This rendered the case different from the more typical voluntary-abandonment cases in which the change in conduct comes first and is followed by the dismissal for mootness. As the opinion adopted by the full Fourth Circuit explained, it is hard to understand "how moot lawsuits, in which the possibility of relief against a party is by definition foreclosed, continue nonetheless to function as catalysts for change and for the recovery of attorneys' fees." 6 F.3d at 170.

better rule.[11] As Judge Niemeyer's concurring opinion in the present case points out, the purpose of the fee shifting statutes is to "reward successful *litigants*, not success in the political process even if the political success was a response to the litigation." Pet. App. 9 (emphasis in original). Judge Niemeyer further noted that the point of *S-1* was to avoid awarding attorneys fees to litigants "simply because their position in litigation was vindicated by an external process or sequence of events outside the litigation." *Id.*

The rule adopted by the Fourth Circuit in *S-1* holds that

> *Farrar* merely clarified *Hewitt* by stressing that a voluntary change in conduct must be formalized in a legally enforceable settlement agreement to transform a plaintiff into a prevailing party for purposes of §1988. * * * In other words, the change in conduct must be enforceable in court, not merely gratuitous.

6 F.3d at 171. The requirement of an enforceable judgment or settlement agreement provides "a clear rule for achieving prevailing party status." *Id.* Absent this bright line standard, district courts would be forced to "untangle a web of supposed causal connections to determine whether a party prevailed." *Id.* at 171-172. The contrary standard is awash in ambiguity, as shown by the original panel majority opinion in *S-1*. The panel majority would have had district courts inquiring into whether "the outcome, in whatever form it is realized" was one to which the claimant's efforts "contributed in a substantial way;" this inquiry "will range outside the merits of the basic controversy"

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[11] If certiorari were to be granted, this point would be argued more fully in this respondent's brief on the merits.

and would require courts to "look outside the final judgment to voluntary actions taken by a defendant [which] are causally connected to the litigation." *Id.* at 171 (quoting panel majority opinion, 6 F.3d at 164). Such a broad and vague inquiry would often contravene the direction of *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) that a fee request "should not result in a second major litigation."

Finally, as the opinion adopted by the en banc majority holds, awarding fees for actions taken outside the context of the litigation "serves to disable public officials, who may come to fear that worthwhile changes may be retroactively linked to a lawsuit and result in a hefty bill for attorneys' fees." *S-1*, 6 F.3d at 172. Such a result would penalize state and local officials for making salutary changes.

The post-*Farrar* cases cited by Petitioners, Pet. 13-15, do not represent as monolithic a bloc of authority as Petitioners suggest; indeed, some of those cases illustrate the preferability of the *S-1* approach. For instance, two of the cases cited by Petitioners would have come to the same result applying *S-1*.[12] Two others are significantly distinguishable because the change in conduct occurred *before* the dismissal of the case, unlike the situation in *S-1*.[13] Three cases

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[12] *Kilgour v. City of Pasadena*, 53 F.3d 1007 (9th Cir. 1995)(enforceable judgment existed); *Beard v. Teska*, 31 F.3d 942 (10th Cir. 1994)(settlement existed).

[13] *Paris v. HUD*, 988 F.2d 236 (1st Cir. 1993); *Zinn by Blankenship v. Shalala*, 35 F.3d 273 (7th Cir. 1994).

resulted in findings that no catalyst effect was present.[14] In only two of the ten cases cited at pp. 13-15 of the Petition were the Courts of Appeals able to determine both that the catalyst principle applied *and* that in their view the lawsuit had served as the cause of the defendants' changed conduct; even those two were remanded for determination of the appropriate fee amount.[15] Finally, three of the ten cases were remanded for further findings of fact as to whether the suit was a catalyst for change.[16] In other words, in six of the seven cases cited by Petitioners in which the Courts of Appeals did not rule out an award of fees, a remand was necessary either in order to determine whether a causal connection actually existed, or in order to determine the fee amount. Such protracted fee litigation when catalyst arguments are present go far toward making fee litigation "a second major litigation." *Hensley, supra,* 461 U.S. at 437.[17]

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[14] *Craig v. Gregg Co., Texas*, 988 F.2d 18 (5th Cir. 1993); *Brown v. Local 58, IBEW*, 76 F.3d 762 (6th Cir. 1996); *American Council of the Blind v. Romer*, 992 F.2d 249 (10th Cir. 1993).

[15] *Citizens Against Tax Waste v. Westerville City School*, 985 F.2d 255 (6th Cir. 1993); *Little Rock School Dist. v. Pulaski Co. Special School Dist. No. 1*, 17 F.3d 260 (8th Cir. 1994).

[16] *Paris v. HUD*, 988 F.2d 236 (1st Cir. 1993); *Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541 (3d Cir. 1994); *Zinn by Blankenship v. Shalala*, 35 F.3d 273 (7th Cir. 1994).

[17] It should also be noted that *S-1* was a 7-6 en banc decision of the Fourth Circuit. In view of the closeness of the vote, the atypicality of the fact situation, and the number of cases from other circuits which subsequently have questioned *S-1*, it is possible that the Fourth Circuit might choose to modify *S-1* in an appropriate case. Petitioners in the present case did not seek rehearing en banc.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari in this case is without merit and should be denied.

Respectfully submitted,

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February 28, 1997